STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS BLOOD ALCOHOL TEST RESULTS

DUI; Implied consent allows blood draw without warrant.

The State of Arizona, by and through undersigned counsel, respectfully requests this Court to deny the defendant's Motion to Suppress Blood Alcohol Test Results based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On September 5, 1997 at approximately 10:26 p.m., the defendant was driving a 1997 Mercury Tracer westbound on Thunderbird Road. The defendant attempted to make a left turn onto 35th Avenue when he turned in front of a police vehicle that Officer Henry was driving and caused a collision.

The defendant attempted to leave the scene by running away on foot. Officer Henry and several other officers chased the defendant into a parking lot. When the defendant was caught, the officers observed that he displayed several signs of alcohol impairment. He had poor balance and was staggering; he also had a strong odor of alcohol on his breath, slurred speech, and watery bloodshot eyes. The defendant was then transported to John C. Lincoln Hospital. The passenger in the defendant's vehicle, Silvia Pimentel-Urena, was seriously injured in the accident and was also transported to John C. Lincoln Hospital in critical condition.

At the hospital, Homer Shaulis made three blood draws from the defendant beginning at approximately 12:00 midnight. The Phoenix Police Department laboratory tested the three blood samples for blood alcohol content. The results were .210 for item 1, .210 for item 2, and .18 for item 3.

The defendant is charged with Count I: Manslaughter, a class 2 dangerous felony; Count II: Leaving the scene of a fatal or serious injury accident, a class 3 felony; and Count III: Endangerment, a class 6 dangerous felony.

LAW AND ARGUMENT:

The ability to secure blood (and breath) samples without a search warrant has been addressed in many appellate decisions. In the landmark case of *Schmerber v. California*, 384 U.S. 757 (1966), the United States Supreme Court held that warrantless searches to obtain evidence of blood alcohol concentration are justified when there has been established an arrest and clear indications that the evidence sought (alcohol) will be found in the search. The Court found that drawing blood samples in a hospital environment is a reasonable search performed in a reasonable manner. The Court recognized the evanescent nature of alcohol in the blood stream, and held that such a reasonable and limited search under the circumstances does not violate the Fourth and Fourteenth Amendments of the United States Constitution.

In Arizona, several more recent appellate decisions have considered the legality of warrantless seizures of blood samples. In *State v. Krantz*, 174 Ariz. 211, 848 P.2d 296 (1993), the court upheld the decision in *Schmerber*, *id*. Compelling a suspect to provide a blood sample does not violate due process.

In *State v. Waicelunas*, 138 Ariz. 16, 672 P.2d 968 (Ariz. App. 1983), the Arizona Court of Appeals held that the Implied Consent Law becomes effective only after an individual is under arrest. As the Court held:

> Before an arrest, the implied consent statute has no application and a person may voluntarily agree to a blood test but is free to refuse. Thus, before an arrest, a person

> may refuse to take a breath test without being penalized by having his driver's license suspended for a year.

Id. at 19, 672 P.2d at 971.

The Court went on to hold that an arrest is required before a blood sample may be taken pursuant to the holding of the United States Supreme Court *in Schmerber v. California*, *supra*. In essence, the Court of Appeals held that the Fourth Amendment requires an arrest before a warrantless seizure of blood pursuant to the doctrine announced in *Schmerber*. Because the defendant in *Waicelunas* had never been arrested, neither the Implied Consent Law nor *Schmerber* allowed the taking of his blood, and the evidence was suppressed.

In *State v. Cocio*, 147 Ariz. 277, 709 P.2d 1336 (1985), the Arizona Supreme Court considered the warrantless taking of a blood sample in a different context. In 1982, the legislature enacted A.R.S. § 28-692(M), which states:

> M. Notwithstanding any provision of law to the contrary if a law enforcement officer has probable cause to believe that a person has violated this section and a blood sample is taken from that person for any reason a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes. A person who fails to comply with this subsection is guilty of a class 1 misdemeanor.

The Arizona Supreme Court held that this new statute allowed a blood sample to be obtained without an arrest or search warrant when:

1) Probable cause exists to believe an individual was driving under the influence; and

2) Exigent circumstances exist; and

3) The blood is drawn for medical purposes by medical personnel.

The Arizona Supreme Court found that all three elements were established in *Cocio*, and therefore that the lack of a formal arrest was not in violation of the Fourth Amendment, and that the Implied Consent Law did not apply.

In *State v. Brita*, 154 Ariz. 517, 744 P.2d 429 (Ariz. App. 1987), the Arizona Court of Appeals held that blood could not be *involuntarily* drawn from a suspect except pursuant to A.R.S. § 28-691 or A.R.S. § 28-692(M). As the Court noted, A.R.S. § 28-691 requires an arrest and A.R.S. § 28-692(M) requires that the blood be drawn for medical purposes. The Court found that Brita had not been placed under arrest, and the blood was not drawn for medical purposes. The Court of Appeals held that suppression of the evidence would be required under the circumstances, but declined to do so under the statutory good faith exception to the exclusionary rule [A.R.S. § 13-3925(A)]. The Court of Appeals found that the error in not placing Brita under arrest prior to invoking the Implied Consent Law was made in good faith and applied A.R.S. § 13-3925(A). The Arizona Supreme Court affirmed the decision of the Court of Appeals, with the exception of its application of A.R.S. § 13-3925(A). The Supreme Court held that the issue of "good faith exception" could not be properly raised for the first time on appeal because it involved factual matters more properly decided in the trial court. *State v. Brita*, 158 Ariz. 121, 761 P.2d 1025 (1988).

In *Collins v. Superior Court*, 158 Ariz. 145, 761 P.2d 1049 (1988), the Arizona Supreme Court considered a seizure of a blood sample in an entirely different context. After arrest, Collins was taken to the police station and the Implied Consent Law was explained to him. He refused to submit to a breath test. Police officers then obtained a search warrant, and seized an involuntary sample of his blood. The Arizona Supreme

Court found that such a procedure was in violation of the Implied Consent Law which states that “If a person under arrest refuses to submit to a test designated by the law enforcement agency as provided in subsection A of this Section, none shall be given except pursuant to § 28-692(M).” [A.R.S. § 28-691(D)]. Therefore, because Collins had refused a test pursuant to the Implied Consent Law and the blood was not drawn for medical purposes, the court held that A.R.S. § 28-691(D) prohibited the use of a search warrant to seize an involuntary blood sample.

A copy of the *Schmerber* case is attached to the Court's copy of this response, but not to the original filed with the Clerk of the Court. Pursuant to *Schmerber v. California*, *supra*, the taking of the blood samples did not violate the Fourth and Fourteenth Amendments of the United States Constitution because they were taken pursuant to a valid arrest, by hospital personnel in a medical environment, based on clear evidence that alcohol was present, and under the exigent circumstances that naturally exist due to the highly evanescent nature of alcohol in the bloodstream. Likewise, the taking of the blood sample in this case did not violate state statutes. A.R.S. § 28-692(J) does not apply because the sample in question were not taken for medical purposes. A.R.S. § 28-691 does not apply, since Implied Consent was not invoked after the defendant was arrested for a violation of Title 28, Chapter 6, A.R.S. Therefore, the seizure of the blood sample in this case was a limited and constitutionally permissible search and seizure under *Schmerber v. California*, *supra*, which provides ample authority for their taking.

Clearly, the requirements for obtaining a warrantless seizure of blood from the defendant under Arizona Law were complied with in this case. The defendant was

involved in a collision where a victim sustained serious injuries (which ultimately led to her death), the defendant displayed signs and symptoms of intoxication i.e.: bloodshot watery eyes, thick slowed speech, strong odor of alcohol on his breath and had urinated on himself. The defendant had turned left in front of another vehicle causing the collision and fled the scene. The defendant was placed under arrest for Aggravated Assault (a Title 13 violation), so Implied Consent was not triggered. Therefore, *Schmerber* and *Krantz* were complied with and a search warrant was not necessary before obtaining the defendant's blood.

CONCLUSION

For the foregoing reasons, the State requests the Court to deny the Defendant's Motion to Suppress Test Results.